

9-15-2017

Center for Biological Diversity v. Department of Fish & Wildlife and the Uncertainties in Project-Level Greenhouse Gas Emissions Analysis

Danqing Bai

Follow this and additional works at: <http://scholarship.law.berkeley.edu/elq>

Recommended Citation

Danqing Bai, *Center for Biological Diversity v. Department of Fish & Wildlife and the Uncertainties in Project-Level Greenhouse Gas Emissions Analysis*, 44 *ECOLOGY L. Q.* 521 (2017).

Link to publisher version (DOI)

<http://dx.doi.org/>

This In Brief is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Center for Biological Diversity v. Department of Fish & Wildlife and the Uncertainties in Project-Level Greenhouse Gas Emissions Analysis

INTRODUCTION

The California Global Warming Solutions Act of 2006 (“AB 32”) set statewide goals for greenhouse gas (GHG) emissions reductions.¹ On November 30, 2015, the Supreme Court of California held in *Center for Biological Diversity v. California Department of Fish and Wildlife* that the California Department of Fish and Wildlife (CDFW) could use AB 32 to set the standard for GHG emissions in an Environmental Impact Report (EIR) for the Newhall Ranch Project.² However, the court held that the administrative record lacked substantial evidence to support its finding that emissions would not be “significant.”³

This was the first case in California that dealt with the interplay of GHG and California Environmental Quality Act (CEQA) compliance. CEQA requires all local agencies to prepare an EIR for any project that they intend to carry out or approve that might have a significant effect on the environment.⁴ Neither AB 32 nor the California Air Resources Board’s scoping plan set out a method for CEQA analysis of GHG emissions.⁵ Thus, the court held that in the absence of local standards, CDFW properly adopted AB 32’s state reduction targets for GHG emissions as the threshold-of-significance standard in an EIR.⁶ This holding introduced more uncertainties about how public agencies can estimate the significance of GHG emissions, as the court failed to provide a local standard or any specific guidelines for project-level GHG emissions. This In Brief will first provide an overview of CEQA and AB 32. Then, it will introduce the Newhall Ranch Project. Finally, it will discuss the relevant court holdings and analyze their impacts.

DOI: <https://dx.doi.org/10.15779/Z38Q814R88>

Copyright © 2017 Regents of the University of California.

1. See CAL. HEALTH & SAFETY CODE § 38550 (West 2017).
2. *Ctr. for Biological Diversity v. Cal. Dep’t of Fish & Wildlife*, 361 P.3d 342, 345 (Cal. 2015).
3. *Id.*
4. CAL. PUB. RES. CODE § 21151(a) (West 2017).
5. *Ctr. for Biological Diversity*, 361 P.3d at 348.
6. *Id.* at 352.

I. BACKGROUND

A. Reconciling CEQA and AB 32

AB 32 establishes a state policy to reduce GHG emissions contributing to global warming to 1990 levels by the year 2020.⁷ AB 32 calls for the California Air Resources Board to regulate GHG emissions in an effort to implement the state reduction goal.⁸ This reduction would require either a 30 percent cut from “business-as-usual” emissions levels projected for 2020 or approximately a 15 percent cut from today’s levels.⁹ The “business-as-usual” model assumes no conservation or regulatory efforts beyond what is currently in place.¹⁰ Problematically, neither the bill nor the California Air Resources Board’s scoping plan set out a mandate or method for CEQA analysis of GHG emissions for a proposed project.¹¹ Instead, the new 2010 CEQA guidelines only provide some factors for agencies to consider when assessing the impact significance from GHG emissions.¹²

B. The Newhall Ranch Problem

The Newhall Ranch Project is a residential and commercial development.¹³ CDFW and the United States Army Corps of Engineers prepared a joint EIR on the project’s impact.¹⁴ CDFW claimed its model did not represent “the physical environmental conditions . . . as they exist[ed]” at the time of environmental analysis.¹⁵ Instead, the agency employed a hypothetical business-as-usual emissions model to compare the project’s anticipated emissions to the statewide target set under the scoping plan.¹⁶ The business-as-usual emissions model was used as a comparative tool to evaluate efficiency and conservation efforts, not as a significance baseline.¹⁷

C. Center for Biological Diversity Rejected CDFW’s GHG Emissions Determination

In *Center for Biological Diversity*, the Supreme Court of California held that CDFW abused its discretion by determining that the Newhall Ranch Project’s GHG emissions would not have a significant environmental impact.¹⁸

7. *Id.* at 347.

8. *Id.*

9. *Id.*

10. *Id.* at 348.

11. *Id.*

12. *Id.*

13. *Id.* at 346.

14. *Id.*

15. *Id.* at 353.

16. *Id.*

17. *Id.*

18. *Id.* at 354.

CDFW failed to proceed in the manner CEQA requires and made the impact determination without the support of substantial evidence in the administrative record.¹⁹

First, the court held that CDFW may use the GHG emissions reduction goals from AB 32 to analyze the significance of cumulative impacts.²⁰ Due to the nature of GHG emissions, such measurement made sense compared to measurement against an absolute numerical threshold.²¹ In supporting this holding, the court recognized that impacts from GHG emissions are “global rather than local”²² and “any one project’s contribution is unlikely to be significant by itself.”²³ However, the court warned that while the choice of criterion does not violate CEQA, this finding is qualified by the passage of time.²⁴ “An EIR taking a goal-consistency approach to CEQA significance may in the near future need to consider the project’s effects on meeting longer term emissions reduction targets” beyond the 2020 targets in AB 32.²⁵

Second, the court held that the administrative record lacked sufficient evidence to support the EIR’s finding that the project’s GHG emissions would have no significant cumulative impact.²⁶ The court reached this holding even though the project-level reduction of 31 percent compared to business-as-usual levels was below AB 32’s statewide goal of 29 percent reduction for business-as-usual levels.²⁷ According to the court, the EIR’s deficiency stemmed from the analytical gap caused by using the state level reduction goal for a purpose other than its reduction goal—to measure the efficiency and conservation measures incorporated in a specific land use development.²⁸ The court questioned the EIR’s conclusion because the agency failed to establish a quantitative equivalence between the scoping plan’s statewide comparison and the EIR’s own project-level comparison.²⁹

II. ANALYSIS

The court in *Center for Biological Diversity* created uncertainties for public agencies trying to determine a project’s significance of GHG emissions for CEQA compliance. By approving the general method used by CDFW, but rejecting its execution in the specific project, the court left agencies with no guidance on whether an EIR will be sufficient.³⁰ And the court created further

19. *Id.* at 354–55.

20. *Id.*

21. *Id.* at 351.

22. *Id.* at 350.

23. *Id.*

24. *Id.* at 352.

25. *Id.*

26. *Id.* at 354–55.

27. *See id.* at 354.

28. *Id.* at 355.

29. *Id.*

30. *See id.* at 365 (Corrigan, J., concurring in part and dissenting in part). [29]

uncertainty when it held that different standards will likely be needed after 2020, when the initial AB 32 calculation ends.³¹

A. Uncertainties in Executing an Approved Methodology

The court rejected CDFW's use of AB 32's state reduction goal as the benchmark reduction goal for the Newhall Ranch Project.³² However, it did not provide the appropriate level for future GHG project reductions, but rather laid out three potential options.³³ First, a lead agency might be able to determine what level of reduction a new land use development must contribute to comply with statewide goals.³⁴ Second, a lead agency might assess consistency with AB 32's goal in whole or in part by looking to compliance with regulatory programs designed to reduce GHG emissions from particular activities, such as high building efficiency and conservation standards.³⁵ Although agencies still retain some deference under either option, there will still be confusion because it is unclear which of the two possible standards should be applied. The court also recognized a third option: a lead agency can use existing numerical thresholds of significance for GHG emissions, such as the threshold in the Bay Area Air Quality Management District's regulation.³⁶

Consequently, it seems harder to ensure new projects comply with both CEQA and AB 32. On the one hand, the court recognized that an absolute numerical value was not sufficient or reasonable when determining the significance of GHG emissions because of the lack of scientific and regulatory consensus.³⁷ On the other hand, in rejecting CDFW's approach relying on a state-level reduction goal for project level reduction, the court listed "numerical thresholds" as a possible method for evaluation.³⁸

Problematically, as Justice Corrigan stated in the concurrence, "we have no assurance it is even possible to calculate how a statewide goal corresponds to specific, quantitative efficiency measures for individual projects."³⁹ Therefore, the majority opinion "gives little practical aid to the agencies that will have to implement our decision on remand."⁴⁰ The court allowed freedom in a lead agency's choice of methodology but gave little guidance on how to implement these methodologies.⁴¹

31. *See id.* at 352.

32. *Id.* at 353–54.

33. *Id.* at 356–58.

34. *Id.* at 356.

35. *Id.* 356–57.

36. *Id.* at 357–58.

37. *See id.* at 351–52.

38. *Id.* at 357.

39. *Id.* at 365 (Corrigan, J., concurring in part and dissenting in part).

40. *Id.*

41. *See id.* at 365–67 (Corrigan, J., concurring in part and dissenting in part).

B. Uncertainties in Long-Term Compliance

In addition, the court qualifies the timeliness of the decision. The majority held that an “EIR taking a goal-consistency approach to CEQA significance may in the near future need to consider the project’s effects on meeting longer term emissions reduction targets.”⁴² The court hinted that with the year 2020 approaching, the California State Legislature may implement new reduction goals and using the 2020 levels from AB 32 may no longer be consistent with CEQA.⁴³ As Justice Chin pointed out in the dissent, the majority holding might be used as a delaying tactic to cause more harm than good.⁴⁴

Further compounding this worry, in August 2016, the California State Senate passed Senate Bill 32 which authorized the California Air Resources Board to reduce GHG emissions to 40 percent below 1990 levels by 2030.⁴⁵ The lack of certainty is going to create an additional burden for developers and could lead to wasted resources. The courts need to determine proper standards for project-level GHG emissions reductions past 2020 soon. This question is likely to be addressed in *Cleveland National Forest Foundation v. San Diego Association of Governments*, as the Supreme Court of California has granted review of the case.⁴⁶

CONCLUSION

California courts are leading the way in climate change litigation. *Center for Biological Diversity*’s majority recognized a statewide reduction goal as a starting point for GHG emissions analysis, because of the nature and broad impact of GHG emissions.⁴⁷ This can be significant for future environmental policy because it suggests holistic, flexible environmental assessment and regulation that is more than numerical thresholds.⁴⁸ However, without offering guidance on how to effectively achieve the goal, it has yet to give clear direction on how developers can comply with climate change regulations and

42. *Id.* at 352 (majority opinion).

43. *Id.* at 352, 352 n.6.

44. *Id.* at 373 (Chin, J., dissenting).

45. S.B. 32, 2015–16 Leg., Reg. Sess. (Cal. 2016) (codified at CAL. HEALTH & SAFETY CODE § 38566 (West 2017)).

46. TODD O. MAIDEN ET AL., REED SMITH, LACK OF COURT DIRECTION REQUIRES DEVELOPERS AND LENDERS TO ESTIMATE THEIR OWN SIGNIFICANCE THRESHOLDS FOR GHG EMISSIONS PAST 2020, (2016), [https://www.reedsmith.com/files/Publication/afafaddd-a3e8-4e5c-89e7-43e99dbd995d/Presentation/PublicationAttachment/c8526cfc-db98-440f-a905-5f0872bafef7/alert16166%20\(1\).pdf](https://www.reedsmith.com/files/Publication/afafaddd-a3e8-4e5c-89e7-43e99dbd995d/Presentation/PublicationAttachment/c8526cfc-db98-440f-a905-5f0872bafef7/alert16166%20(1).pdf).

47. *Ctr. for Biological Diversity*, 361 P.3d at 350.

48. *See id.*

how local governments can properly evaluate individual development projects' environmental impacts.

Danqing Bai

We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.